HONG WAI

v.

UNITED MALAYAN BANKING CORP. BHD.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 100 OF 1979]
25 FEBRUARY 1984

BANKING: *Current partnership account - Authority to withdraw given to one partner alone - Money withdrawn by other partner - Effect - Whether other partner had authority - Documents produced at bank - Whether forgery - Cheque signed by other partner - Whether forgery - Effect - Liability of banker - Whether banker in breach of contractual and/or tortious duty of care - Contributory negligence - Whether plaintiff liable.*

CIVIL PROCEDURE: *Partnership - Action by one partner - Whether other partner should have been joined as a party.*

On 13 March 1979, the plaintiff ("the Account Holder") and one Wan Mohd bin Wan Ibrahim ("WM") entered into a partnership. They opened a current account, with the defendant Bank ("the Bank") in the partnership name. Only the Account Holder had authority to sign cheques. RM10,000 was transferred from the Account Holder's personal savings account into the partnership account. On 16 April 1979, WM went to the Bank alone. He produced a Form B (D11) prescribed under the Registration of Businesses Ordinance, 1956, duly signed and registered showing that the Account Holder had withdrawn from the partnership on 29 March 1979. He also produced a document (D12) signed by him and purportedly signed also by the Account Holder authorising WM to sign by himself cheques drawn on the account. WM closed the bank account, immediately. He signed a blank cheque (D15) taken by the relief officer attending him from another customer's cheque book, and withdrew the whole of the RM10,000 in the partnership account. The Account Holder brought an action for a declaration that the Bank was not entitled to debit his account with the sum of RM10,000 paid to WM. He alleged breach of contract.

Held:

[1] The signature of the Account Holder on D12 was a forgery and D11 was fraudulently the Account Holder's withdrawal from the partnership.

[2] Therefore D15 was a complete forgery. A signature based entirely on an antecedent forgery is equally a forgery.

[3] The Bank was absolutely liable to the Account Holder for the RM10,000 debited against his account. A forged cheque is inoperative as provided by s. 24 (which must be distinguished from s. 60) of the Bills of Exchange Act 1949. The effect of a forged cheque is that a paying banker, except for the defences of adoption and estoppel, is absolutely liable to a customer for any money paid out on such a forgery irrespective of whether there was in fact any actual breach of duty to exercise care or negligence. Further, in addition to the basic contract of creditor and debtor between the customer and banker, there is an implied contractual obligation on the part of the banker to take care when paying money on cheques drawn on the banker by his customer.

[4] The Account Holder could bring an action against the Bank without joining W.M., his partner.

[5] Though WM's action might bind the partnership it did not bind the Account Holder, who was innocent of the forgeries.

[6] There was no evidence of contributory negligence on the part of the Account Holder.

[7] The Bank was liable on the ground also of actual negligence or actual breach of the duty to exercise care in paying out the money. In the circumstances of the case the Bank should have made an enquiry but had failed to do so. Further, the Bank had failed to follow some of its own regulations.

[Judgment for plaintiff.]

Cases referred to:
Chartered Bank v. Yong Chan [1974] 1 MLJ 157
Imperial Bank of Canada v. Bank of Hamilton [1903] AC 49
Selangor United Rubber Estates Ltd. v. Cradock (a bankrupt) & Ors. (No. 3) [1968] 2 All ER 1073
Liggett (Liverpool) Ltd. v. Barclays Bank Ltd. [1972] All ER 451
Motor Traders Guarantee Corporation Ltd. v. Midland Bank Ltd. [1937] 4 All ER 90

Legislation referred to:
Bills of Exchange Act 1949, ss. 24, 60

For the plaintiff - Leow Shin Fong; M/s. Arifin & Partners
For the defendant - Lee Boon Peng (Francis Lim with him) M/s. Lee Boon Peng & Co.

JUDGMENT

Peh Swee Chin J:

This case raises some questions which should be of great concern to bankers. I will hereafter call the plaintiff as the Account Holder and the defendant as the Bank.

The following facts appear to have been admitted or undisputed from the pleadings filed and the oral evidence taken. The Account Holder was at all material times a hawker of cold drinks of the non-alcoholic variety at a stall in front of the premises of the Bank. He had been carrying on his small business there at all material times and also for about seven years at the same site. On 13 March 1979, the Account Holder entered into a partnership to carry on a business with a person called Wan Mohd bin Wan Ibrahim (hereafter called WM) of wholesalers in flour, cooking oil etc. They went together to the Bank to open a current account in the partnership's name of Syarikat Wanika Malaysia and they both signed a printed application form (D10). (D10) does not only contain some of the conditions imposed by the Bank and to which the Account Holder and WM had agreed by signing thereon, but it also includes a crucial fact, viz. a direction or mandate to the Bank only to pay cheques drawn on the current account and signed by the Account Holder alone, WM not having any right to sign such cheques. The current account was started with RM10,000 transferred from the Account Holder's personal savings account kept with the Bank. This explains also why the Account Holder was alone entitled to draw cheques on the current account. The Bank debited the current account with RM5 for the stamp duty for the cheque book (P5) leaving a round figure of RM10,000 standing to the credit of the current account.

On 16 April 1979, WM alone called on the Bank and transacted some business, which gave rise to all the problems in this case. He produced to DW1, a relief officer at that time, a Form B (D11) prescribed under the Registration of Businesses Ordinance, 1956 duly signed and registered showing that the Account Holder had withdrawn from the partnership on 29 March 1979. (D11) shows something rather peculiar. In the column opposite the printed words "Constitution of

business", the word of partnership appears to have been deleted with a line drawn across it and substituted with the words meaning sole-proprietorship. The deletion was not initialled or signed. WM also produced to DW1 document (D12) dated also 16 April 1979, addressed to the Bank's manager and bearing thereon, the signature of WM; the hotly disputed signature of the Account Holder, and a further direction or mandate to the Bank that WM could alone henceforth sign cheques drawn on the current account by himself like the Account Holder i.e., as a sole authorised signatory also. I pause here to observe that the (D12) bears the very date when WM called on the Bank and it contains no mention of any intention to close the current account. WM at the same time made two requests to DW1; one being to ask DW1 for a blank cheque for the purpose of withdrawing all the money standing to the credit of the current account; and the other being to close the current account then and there. WM did not have the cheque book with him. What DW1 did was rather striking. DW1 took a blank cheque leaf or cheque from a cheque book of another customer of the Bank, cancelling that customer's account number and putting the current account number of the Account Holder, i.e., 3130 on it. He wrote out the Cheque (D15), as cash cheque, WM then signed it, purportedly as one of the authorised signatories and pocketed the sum of RM10,000. On the same day, but later, the Account Holder walked into the Bank when informed of such withdrawal after such withdrawal and saw DW3, the manager of the Bank asking about the withdrawal of the money, expressed his sense of shock and denied the signature on (D12) purporting to be his signature. (D12) authorised WM to sign cheques on the current account. The Account Holder further denied having withdrawn from the partnership. DW3 asked DW1 and the Account Holder to see the solicitor who prepared the Form B (D11) and to look for WM.

The solicitor (PW2), in regard to (D11) deposed that both the Account Holder and WM had seen him and instructed him that the place or address of the partnership business was to be changed and that they were to sign the usual Form B of the business registration before him. (D11) was already filled up by WM and brought by WM to PW2, when it was produced to PW2. He examined (D11) and at that time, he found there was no cancellation of the word "partnership" and no change of such word to the words "sole-proprietorship" as seen by him in Court. Neither was it written at that time in (D11) that the Account Holder had withdrawn from the partnership on 29 March 1979. PW2 then signed (D11) as a witness of both signatures of WM and the Account Holder in his capacity as solicitor. WM then suggested to PW2 to be allowed to bring by himself (D11) to the business registry to speed up the matter of registering (D11). PW2 agreed and gave him the (D11). PW2 also deposed to the visit on another occasion by the Account Holder and DW1 about the withdrawal of the sum of RM10,000. The Account Holder was, according to him, practically in tears and he complained to PW2 about having been cheated and about wanting to sue the Bank for allowing the money to be withdrawn while he was still holding the cheque book. PW2 said further that he told DW1 that the latter should have at least verified the matter with the Account Holder just in front of the Bank's premises and that DW1 looked very "panicky". PW2's evidence was really never challenged by DW1 and I accept it also in toto.

It was not disputed that the Account Holder and DW1 did make a fruitless search for WM in Petaling Jaya and Kuala Lumpur and that later the Account Holder did lodge a report with the same story as he told the Court, complaining about being cheated.

DW1 told the Court that he had compared signatures of the Account Holder and referred them also to his colleagues in the Bank before the final payment to WM. I accept what he said here and I accept that he honestly believed that (D12) and (D11) were genuine documents.

The Account Holder deposed that he never signed (D12) which authorised WM to sign cheques, and neither did he withdraw from the partnership. I observed him very very closely. He impressed me as a witness of truth because he managed to look "very hurt" without exaggeration in his evidence. He did not blush but looked rather depressed. A witness does blush sometimes when telling lies. I tested this impression of his demeanour with what PW2 said and the rest of all the evidence in this case. I have considered very carefully a suggestion from DW3 (the Bank's manager) that the whole affair was a conspiracy by WM and the Account Holder to cheat the Bank. DW3 was not able to produce one piece of concrete evidence to support this suspicion he had.

I accept the evidence that the signature of the Account Holder on (D12) (letter authorising WM to sign cheques) was forged; that he never retired or withdrew from the partnership; that (D11) (Form B) was fraudulently altered by WM to suggest such withdrawal.

It is now necessary to refer to some questions of law in the light of which, Counsel's opposing contentions can be determined.

It is settled law that the relationship between a banker and his customer is founded on contract. The basic contract is one of creditor and debtor. In my view, over and above this basic contract, other contracts or special contracts may arise and may be inferred either, (a) from the conduct of the parties, e.g. a banker charging compound interest on his customer's overdraft account and a customer having acquiesced to it, or (b) from being implied by law or Court by imputing to the parties certain presumed intentions e.g. that a banker has to exercise care in the paying out for his customer, of his customer's credit balance in the customer's current account and that the customer has to exercise care so as not to facilitate forgery etc. I am fortified in my view about the multi-contractual relationship by the case of *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157 and at 160. In my view, instead of saying about a basic contract with superadded special or other contracts, it would not be wrong to say in other words about a single basic contract with terms or obligations added thereon by the parties on account of such inference from conduct of the parties or from being implied by law. The point I wish to stress is that there is an implied contractual obligation therefore for a banker to take care when paying money on cheques drawn on the banker by his customer on the customer's current account, and should he pay out any money without the authority of his customer, he is in breach of the implied contractual obligation to take care and he cannot, in consequence, debit his customer's current account with such payment. Of course, a banker can be sued for negligence in tort as well, or in addition, independently of such implied contractual obligation to take care, but having regard to the statement of claim filed herein, in which the Account Holder has alleged that the payment to WM was without his authority the plaintiff appears to have sued in contract, therefore, for the implied contractual duty to take care as stated above.

In consequence of my finding that the signature of the Account Holder on (D12) which purportedly authorised WM to sign cheques was a forgery and that (D11) was fraudulently altered to show purportedly the Account Holder's withdrawal from the partnership, while he did not so withdraw, the inevitable further finding must be that the cash cheque signed by WM (D15) was a complete forgery. A forgery based entirely on another antecedent forgery is equally a forgery as the former, bearing in mind the fact that all forgeries are designed to look genuine.

What is then the effect of a forgery? It is a false document fabricated and intended to be used as genuine. It is in my judgment, just a piece of paper which carries no rights or liabilities, in other words, it is a nullity binding on no one. See *Imperial Bank of Canada v. Bank of*

Hamilton [1903] AC 49. Thus s. 24 of the Bills of Exchange Act, 1949 (the Act) expressly declares that a bill with the drawer's signature thereon or placed thereon without authority as a forged or unauthorised one and is wholly inoperative. It may be pertinent to point out at this stage that in the case of the exceptional case of a forged indorsement, a paying bank is protected to some extent by s. 60 of the Act. A wholly forged cheque or a cheque with the drawer's signature forged as distinct from a forged indorsement, unless the actual and authorised signatory is precluded from relying on such forgery, is a nullity binding on no one. A genuine drawer i.e., signatory can only be so precluded either by his own adoption of such forgery or by estoppel by conduct.

The effect of a forged cheque as distinct from the limited exception of a forged indorsement only on a cheque is that a paying banker, except for the defences of adoption and estoppel, is absolutely liable to a customer for any money paid out on such a forgery irrespective of whether there is in fact any actual breach of duty to exercise care or negligence. There is nothing of course to prevent a banker from reducing damages so payable by establishing contributory negligence against such a customer.

Again, there is another question of law I must refer to. The current account herein, like other partnership accounts, is a joint account with the Bank. The basic contract with a banker is to have joint account and for the banker to hold such money on a joint account. When however there is a superadded contract or agreement for the banker to honour cheques drawn and signed by each of the partners individually then each of the partner/drawer can bring an action alone against the bank to recover damages to which he is entitled without joining the other partner/drawer. Thus, the then Raja Azlan Shah FJ in the Federal Court in the case of *Chartered Bank v. Yong Chan* (*supra*), held so to the effect.

Now let us examine the submission of the learned Counsel for defence. He relied heavily on the technical point to the effect that the current account being a partnership account, the Account Holder could not sue the Bank alone without joining WM. This argument though attractive, is not acceptable to the Court for reasons given above, including the decision of the Federal Court in the *Chartered Bank* case (*supra*). It was also submitted that WM's action i.e., (D11), (D12) and (D15) would bind the partnership and therefore the Account Holder. In view of my express finding about (D11) and (D12) were forgeries invented against the Account Holder who was innocent, such submission would therefore be of no substance. Learned Counsel again submitted also that the Account Holder was negligent himself by leaving earlier the office of PW2, (the solicitor) after signing (D11) that enabled WM to induce PW2 to part with the Form B for registration by WM himself and not PW2. I do not think that the mere act of the Account Holder leaving the office of PW2 earlier can give rise to any contributory negligence against him. It was submitted that (D15) had the imprint of the stamping of rubber seal of the partnership thereby implying that the Account Holder had acknowledged WM as an authorised signatory. This appears to be quite irrelevant in view of my finding above. The rubber seal must have been in the possession of WM as manager and partner and there could be no reason for the necessity of making two rubber seals or stamps as the Account Holder had his stall business to attend to and appeared to be the dormant partner of the partnership the business of which never incidentally took off the ground. The possession by WM of the rubber seal is therefore not evidence of contributory negligence against the Account Holder.

In view of (D15) i.e., the cash cheque signed by WM being a total forgery, I therefore hold the Bank here was not entitled to debit the current account No. 3130 of the Account Holder with the sum of RM10,000 it had paid to WM.

There is another distinct and self-sufficient ground for holding the Bank liable for paying the said sum of RM10,000 to WM on the ground of actual negligence, or actual breach of the duty to exercise care in paying out the money. There are two reasons. The first is that where there are circumstances in any particular case which should put a banker on enquiry, then he should make an enquiry with the relevant persons, and failure to do so would be negligence or breach of duty to exercise care. The judgment of Ungoed-Thomas J in *Selangor United Rubber Estates Ltd .v Cradock (a bankrupt) & Ors. (No. 3)* [1968] 2 All ER 1073 is a case in point. The case of *Liggett (Liverpool) Ltd. v. Barclays Bank Ltd.* [1927] All ER 451, is another case. In the instant case there were the following circumstances. (D12), purportedly a letter of authority from the Account Holder, merely authorised WM to sign cheques but without mentioning the closure of the current account. There was some uninitialled or unsigned alteration of the word "partnership" to the words "sole-proprietorship" in Bahasa Malaysia. The immediate withdrawal of the total sum from the current account on the same date which the (D11) bears also should give rise to reasonable suspicion. If the Account Holder wanted to withdraw all the money, it would have been such a simple matter of writing out a cheque leaf from the cheque book given to and kept by the Account Holder; the Account Holder was in front of the Bank's premises carrying on his daily business at the stall, and there would not be the slightest difficulty for the Account Holder to walk in to the premises of the Bank, while it was much more troublesome for WM of Petaling Jaya or Kuala Lumpur to come all the way to do so. WM was not accompanied by the Account Holder for the withdrawal of what must have been a fortune in the eyes of the Account Holder who was a hawker. Let us compare the circumstances with those in the *Selangor United Rubber* case (*supra*). In that case, Cradock acquired 79% of the issued capital of the plaintiff Company by utilising the credit balance in the current account opened by the plaintiff there in the Oxford Street Branch of District Bank, London. The plaintiff had an earlier and existing current account with National Bank. The relevant sum was transferred from the plaintiff's account at National Bank to the account at District Bank through the help of directors of the plaintiff Company manipulated by Cradock . Then the money was again transferred by a cheque to a third party (a ruse from all appearances), who then lent it, (i.e., the same cheque) to Cradock for Cradock's own account kept also at the same bank, i.e., the District Bank. Money was then drawn from Cradock's personal account at the bank to pay for the acquisition of the 79% of the issued capital. The learned Judge held that enquiry should have been made of the plaintiff's directors obviously in view of those circumstances which should have put the banker on enquiry.

I think I ought to refer to the Form B (D11) which was relied on by the learned Counsel for the defence. I have found a bare statement in *Halsbury's Laws of England*, 3rd Edn., Vol. 2, para. 343 at p. 180 which says:-

> ... the production of a certificate under the Registration of Businesses Names Act, 1916 has been held sufficient to satisfy a banker put on enquiry.

The relevant foot-note refers to a case mentioned in the Journal of Institute of Bankers but unreported. Without the benefit of having the facts, and the reasoning of that case, very little reliance can be made on this bare statement. It would depend on the facts of each case. Assuming this rule applies for the sake of argument, it certainly would not be applied in the instant case when a printed condition imposed by the Bank in (D10) itself provided that no alteration in the constitution of the partnership by death, retirement etc. of one ... of the partners should otherwise affect this authority in any way, this authority being, *inter alia,* to pay all cheques signed only by the Account Holder.

The second reason for finding negligence i.e., breach of duty to exercise care is that it can be inferred from the very striking departure from the Bank's own regulations. This arose when DW1 the Bank's officer, instead of using a cheque leaf or form from the cheque book of current account No. 3130, took a blank cheque leaf from another cheque book of another customer's account, altering the account number on that cheque. This was not only contrary to r. 7 of the rules for current accounts i.e., (P4) which was supplied by the Bank to the Account Holder, but in evidence, all the bank officers of the Bank, including DW1 said, it was an abnormal practice to do so. The exhortations to be cautious about safe-keeping of cheque books printed on the cover of all cheque books would be rendered nugatory and meaningless. In *Motor Traders Guarantee Corporation Ltd. v. Midland Bank Ltd.* [1937] 4 All ER 90 Goddard J as he then was, relied on partly the banker's failure to follow some of the banker's own regulations is giving judgment against the Midland Bank Ltd. defendant there.

I hold, on the issue also of negligence of breach of duty to exercise care, the Bank also liable. I pause to observe that a common complaint about the banks being too conservative, in the sense of their being excessively cautious, is not really justified.

I therefore make the declaration that the Bank was not entitled to debit the current account No. 3130 with the sum of RM10,000 paid to WM. Since the sum standing to the credit of the current balance was clearly proved to be the Account Holder's personal money, I therefore give judgment with costs for plaintiff against the defendant for the sum of RM10,000 with interest at the rate of 4% per annum from 16 March 1979 to date of judgment, and thereafter at the rate of 8% per annum until satisfaction.

Also found at [1984] 2 CLJ 42